In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 189

DAVID V. LANSDEN, ET AL., PETITIONERS

v.

WILLIAM W. HART, AS UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF ILLINOIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS HART, MARTIN, AND SJOSTROM IN OPPOSITION

OPINIONS BELOW

The memorandum of the district court (R. 37-42) is not reported. The opinion of the court of appeals (R. 59-66) is reported in 180 F. 2d 679, and its opinion upon a previous appeal in this case is reported in 168 F. 2d 409.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1950 (R. 67). A petition

for rehearing was denied on April 11, 1950 (R. 68). The petition for a writ of certiorari was filed on July 10, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254.

QUESTION PRESENTED

Whether, in view of the discretion vested in the President and the Secretary of the Interior to issue regulations governing the hunting of migratory birds, the complaint states any basis for enjoining the enforcement of a regulation establishing a closed area.

STATUTE INVOLVED

The Migratory Bird Treaty Act of July 3, 1918, secs. 2 and 3, 40 Stat. 755, as amended by the Act of June 20, 1936, Secs. 2 and 3, 49 Stat. 1556, and by Reorganization Plan No. II, Sec. 4(f), 53 Stat. 1433, 16 U.S.C. secs. 703 and 704, provides:

> Sec. 2. That unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, or any part, nest, or egg of any such birds, included

in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, and the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936.

Sec. 3. That subject to the provisions and in order to carry out the purposes of the conventions, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

STATEMENT

This suit was instituted in November 1947, to enjoin various officials of the Federal and State governments from enforcing certain regulations relating to migratory birds. The various plaintiffs, it is alleged, own or lease farms in the vicinity of Horse Shoe Lake, Alexander County, Illinois, where the State has established a game preserve.

On October 1, 1947, the President pursuant to the Migratory Bird Treaty Act of July 3, 1918, as amended, 16 U.S.C. 703-711, signed Proclamation 2748, 12 F.R. 6521, which prohibited hunting of all species of wild geese in a designated area surrounding the Horse Shoe Lake Preserve. The regulations under the Migratory Bird Treaty Act, which are re-issued annually, have included a similar prohibition for the 1948 season (Proclamation 2801, 13 F.R. 4411) and the 1949 season (Proclamation 2848, 14 F.R. 4798). A similar proclamation was signed at the same time by the Governor of Illinois.

Alleging that enforcement of these proclamations would cause losses to the plaintiffs in the conduct of hunting business on farms owned or leased by them, plaintiffs sought an injunction against enforcement of the proclamations asserting illegality in various particulars. A preliminary injunction was denied and this order was affirmed upon appeal. *Lansden* v. *Hart,* 168 F. 2d 409 (C.A. 7). Pointing out that the Act prohibits all hunting of migratory birds except as may be permitted by regulation, the court held that Proclamation 2748 was a proper exercise of the administrative discretion vested in the Secretary of the Interior and the President. It rejected plaintiffs' claims that as a matter of law no permanently closed area could be established, that an area as small as 20,000 acres could not be

closed while hunting is permitted in the rest of the State, and that a closed area could not be established on privately-owned land adjacent to a State refuge rather than a Federal refuge.

A petition for writ of certiorari to review this decision having been denied, *Lansden* v. *Hart,* 335 U.S. 858, the trial court granted defendants' motions to dismiss the complaint on the ground that it had no jurisdiction and, alternatively, that the complaint failed to show adequate grounds for an injunction (R. 37-42). The court of appeals held that, except as to one plaintiff, jurisdiction was sufficiently asserted in the allegations that the value of the right to hunt which would be lost by enforcement of the regulation exceeded $3,000 in each instance (R. 62-63). It rejected, however, the further claim that section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 243, 5 U.S.C. 1009, gave plaintiffs a right to judicial review holding that the exception from section 10 where "agency action is by law committed to agency discretion" applied (R. 63-65). The court below affirmed the judgment of dismissal on the ground that plaintiffs could not possibly state a claim under any theory of law upon which relief could be granted, since the agency action, if reviewable at all, could be overturned only if it was so arbitrary and capricious as to constitute an abuse of discretion, and that the facts set out in the complaint themselves negative any abuse of discretion.

ARGUMENT

1. Petitioners assert that some sixteen questions are presented which they group into seven points in their argument (Pet. 25-32). Analysis will show, however, that petitioners fail to indicate any error in the decision below. Petitioners' claim (Point II, Pet. 26-27), that the Proclamation was invalid because a permanently closed area could not be established under the Migratory Bird Treaty Act, that the area here was too small and was adjacent to a State wild life refuge, plainly lacks merit, as was held upon the first appeal in this case, because of the broad discretion vested in the administrative officers to determine "when, to what extent, if at all" hunting should be permitted. The only remaining claim, characterizing the Proclamation as "arbitrary, capricious, and an abuse of discretion," "discriminatory" and "unreasonable" (paragraphs 49, 50 of the complaint, R. 15) presents no basis for the granting of relief to petitioners. As the court below pointed out (R. 65), the complaint "shows extraordinary effort by the agency to arrive at a fair and reasoned conclusion." Many conferences and hearings were held, interested persons were given an opportunity to submit their views, data and arguments, and these were presented on behalf of all the petitioners (paragraphs 35, 37-41, R. 11-13). It is thus apparent that petitioners seek simply a judicial review of the wisdom of the administra-

tive action. But clearly the Migratory Bird Treaty Act vested discretion in the Secretary of the Interior and the President to determine what regulations were desirable. The facts which petitioners desire to submit to the courts—the "scientific, biological and economic facts" (Pet. 29)—would relate, at most, to the question whether the proclamation was unwise and hence could not be the basis of a conclusion that the proclamation was illegal. It follows that dismissal of the complaint was clearly correct.

We believe that the court below was plainly right in holding that the Administrative Procedure Act did not constitute an additional and independent ground of federal jurisdiction. In any event, since the court found that jurisdiction did exist except as to plaintiffs Stenzels, petitioners' argument concerning the Act (Points I, III, IV, Pet. 25, 27, 28) presents no ground for review of the present decision. Certainly the Administrative Procedure Act did not vest in the courts a general supervisory authority over the exercise of the discretion vested in the Secretary of the Interior and the President by the Migratory Bird Treaty Act, nor did it give to petitioners the right which they seek to "exercise a compelling voice in the management of waterfowl." (Pet. 31).[1]

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[1] Petitioners' objection to the procedure by which the Proclamation was first adopted (Points VI, VII, Pet. 29-31) were correctly rejected upon the first appeal and, since the

CONCLUSION

The decision of the court below is correct and presents no conflict or question which should be decided by this Court.

Respectfully submitted,

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AUGUST 1950.

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regulations have been re-issued annually after compliance with the acts relied upon by petitioner (Pet. 29-30), any question as to procedural defects in the original proceedings is plainly moot.

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